

LISA MARIE BOYCE,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

)
) No. CV-10-5102-CI
)
) ORDER DENYING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND GRANTING DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT
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BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 16.) Attorney Thomas A. Bothwell represents Lisa Marie Boyce (Plaintiff); Special Assistant United States Attorney Kathy Reif represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

Plaintiff protectively filed for Supplemental Security Income (SSI) on November 28, 2007. (Tr. 150.) She alleged disability due to fibromyalgia, sleep problems, and migraines. (Tr. 132.) Her claim was denied initially and on reconsideration. Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on September 17, 2009, before ALJ R.S. Chester. (Tr. 33.) Plaintiff, who was represented by counsel, medical expert David

1 Rubin, Ph.D., and vocational expert Daniel McKinney, Ed.D. (VE)
2 testified. (Tr. 34.) The ALJ denied benefits on October 2, 2009,
3 and the Appeals Council denied review. (Tr. 16-29, 1-5.) The
4 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

5 STANDARD OF REVIEW

6 It is the role of the trier of fact, not this court, to resolve
7 conflicts in evidence. *Richardson v. Perales*, 402 U.S. 389, 400
8 (1971). If evidence supports more than one rational interpretation,
9 the court may not substitute its judgment for that of the
10 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999);
11 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless,
12 a decision supported by substantial evidence will still be set aside
13 if the proper legal standards were not applied in weighing the
14 evidence and making the decision. *Browner v. Secretary of Health*
15 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If there is
16 substantial evidence to support the administrative findings, or if
17 there is conflicting evidence that will support a finding of either
18 disability or non-disability, the finding of the Commissioner is
19 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
20 1987).

21 SEQUENTIAL EVALUATION PROCESS

22 The Commissioner has established a five-step sequential
23 evaluation process for determining whether a person is disabled. 20
24 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
25 137, 140-42 (1987). In steps one through four, the burden of proof
26 rests upon the claimant to establish a prima facie case of
27 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
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1 920, 921 (9th Cir. 1971). This burden is met once a claimant
2 establishes that a physical or mental impairment prevents him from
3 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),
4 416.920(a). At step five, the burden shifts to the Commissioner to
5 show that (1) the claimant can perform other substantial gainful
6 activity; and (2) a "significant number of jobs exist in the
7 national economy" which claimant can perform. 20 C.F.R. §§
8 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
9 1498 (9th Cir. 1984).

10 STATEMENT OF THE CASE

11 The facts of the case are set forth in detail in the transcript
12 of proceedings, and are briefly summarized here. At the time of the
13 hearing, Plaintiff was 32 years old with a high school education.
14 (Tr. 136.) She lived with her spouse and three children. Plaintiff
15 reported she had not been employed full time in the past, but had
16 worked part time as a patient care-giver. (Tr. 292.) She testified
17 she cared for her children, did household chores, shopped, and
18 attended her children's activities. (Tr. 61-63.) She stated she
19 could not work due to pain and fatigue caused by her impairments.
20 (Tr. 51-54.)

21 ADMINISTRATIVE DECISION

22 At step one, the ALJ found Plaintiff had not engaged in
23 substantial gainful activity since the application date. (Tr. 18.)
24 At step two, he found Plaintiff had the severe impairments of
25 fibromyalgia, sleep apnea, left shoulder injury, morbid obesity,
26 migraine headaches, depression, and post-traumatic stress disorder.
27 (*Id.*) At step three, he found Plaintiff's impairments, alone and in
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1 combination, did not meet or medically equal one of the listed
2 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
3 (Listings). (Tr. 23. At step four he determined she had the
4 residual functional capacity (RFC) to perform light work with the
5 following restrictions:

6 She can stand and/or walk 2 hours and sit 6 hours in an 8
7 hour day. She can occasionally climb ramps or stairs but
8 should avoid climbing ladders, ropes, or scaffolds. She
9 can occasionally engage in stooping, kneeling, crouching,
10 or crawling. She can do occasional overhead reaching with
the left upper extremity. She should avoid concentrated
exposure to hazards such as machinery or heights. She is
limited to simple, 3-step work.

11 (Tr. 24-25.) He found she had no past relevant work. (Tr. 27.) At
12 step five, based on the RFC and VE testimony, the ALJ found there
13 were unskilled jobs in the national economy that Plaintiff could
14 perform. (Tr. 27-28.) He concluded Plaintiff was not disabled as
15 defined by the Social Security Act. (Tr. 28.)

16 ISSUES

17 The question is whether the ALJ's decision is supported by
18 substantial evidence and free of legal error. Plaintiff argues the
19 ALJ erred when he: (1) assessed her credibility; (2) rejected her
20 treating mental health provider's opinions; (3) rejected medical
21 expert testimony, and (4) relied upon vocational expert testimony
22 based on an incomplete hypothetical. (ECF No. 14.) Defendant
23 argues the ALJ's decision is supported by substantial evidence and
24 without error and should be affirmed. (ECF No. 17.)

25 DISCUSSION

26 A. Credibility

27 Plaintiff argues the ALJ improperly rejected her subjective
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1 complaints when he did not identify the evidence that undermines her
2 credibility. (ECF No. 14 at 16.) When the ALJ finds a claimant's
3 symptom allegations are not credible, he must make a credibility
4 determination with findings sufficiently specific to permit the
5 court to conclude the ALJ did not arbitrarily discredit claimant's
6 allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
7 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en
8 banc). If there is no affirmative evidence of malingering, the ALJ
9 must provide "clear and convincing" reasons for rejecting the
10 claimant's allegations. *Reddick v. Chater*, 157 F.3d 715, 722 (9th
11 Cir. 1998). Once the ALJ has found a claimant's impairments could
12 reasonably be expected to produce alleged symptoms, he must consider
13 certain factors in determining credibility.

14 Among those factors are daily activities inconsistent with
15 alleged complaints; inconsistencies between allegations and conduct,
16 observations of physicians and third parties concerning the nature,
17 severity, and effect of the alleged symptoms; and any unexplained
18 failure to follow treatment recommendations. *Tommasetti v. Astrue*,
19 533 F.3d 1035, 1039 (9th Cir. 2008); *Lingenfelter v. Astrue*, 504 F.3d
20 1028, 1040 (9th Cir. 2007). If the ALJ's credibility finding is
21 supported by substantial evidence in the record, "the court may not
22 engage in second-guessing." *Thomas*, 278 F.3d at 959; *Fair v. Bowen*,
23 885 F.2d 587, 604 (9th Cir. 1999) ("credibility determinations are the
24 province of the ALJ").

25 Here, the ALJ summarized Plaintiff's symptom testimony in
26 detail. (Tr. 25-26.) He specifically referenced her testimony that
27 she was bedridden all day most days due to migraines, pain,
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1 depression and fatigue; and that she had migraines 15 times a month.
2 (Tr. 25.) In rejecting this level of incapacity, the ALJ referenced
3 specific inconsistencies in the record. (Tr. 26.) He found her
4 report of the following daily activities was not consistent with
5 statement that she was in bed all day: taking care of three
6 children; performing household chores over the course of the day;
7 reading and working on the computer for hours at a time; doing
8 puzzles; and attending appointments and the children's activities;
9 and caring for her grandmother on a part time basis. *Id.* This is
10 a "clear and convincing" reason to discount Plaintiff's testimony.
11 *Lingenfelter*, 504 F.3d at 1040.

12 Consistency with medical records is also an appropriate factor
13 to consider. *Id.* The ALJ cited objective medical evidence from
14 Plaintiff's orthopedic surgeon and her treating physician that
15 contradict her allegations of debilitating headaches and shoulder
16 pain. (Tr. 26, 200-209, 288.) He also considered inconsistencies
17 between Plaintiff's testimony and observations by medical providers
18 recorded in progress notes as a basis for his adverse credibility
19 findings. For example, Plaintiff's treating physician Arthur Cain,
20 M.D., reported her migraines were reasonably controlled with
21 medication. (Tr. 26, 245.) This observation is also consistent with
22 Plaintiff's own report to Dr. Cain that her migraines were
23 decreasing. (Tr. 183.) Based on this evidence, the ALJ could
24 reasonably find Plaintiff's testimony of disabling symptoms was not
25 entirely credible. See *Warre v. Comm'r of Social Sec. Admin.*, 439
26 F.3d 1001, 1006 (9th Cir. 2006)(impairments controlled with
27 medication are not considered disabling). The ALJ found Plaintiff's
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1 treating physician acknowledged Plaintiff's application for
2 disability insurance, but did not opine her condition precluded
3 work. (Tr. 26.) A treating physician's evidence is properly given
4 great weight. 20 C.F.R. § 416.927. The Commissioner's credibility
5 findings are supported by substantial evidence and free of legal
6 error.

7 **B. Mental Health Therapist: "Other Source" Opinions**

8 Citing *Social Security Ruling* (SSR) 06-03p, Plaintiff argues
9 the ALJ erred in rejecting the opinions of mental health therapist
10 Amy Alvarado, MSW. (ECF No. 14 at 4.) The record contains a two-
11 page letter from Ms. Alvarado dated March 26, 2009, in which she
12 diagnosed Plaintiff with major depressive disorder and posttraumatic
13 stress disorder and listed symptoms. (Tr. 277-78.) In a
14 supplemental letter dated September 15, 2009, Ms. Alvarado describes
15 Plaintiff's stress, fears, and anxiety symptoms. (Tr. 298-99.) The
16 ALJ rejected Ms. Alvarado's opinions because she is not an
17 acceptable medical source under the Regulations, her opinions were
18 not supported by objective tests, and she relied exclusively on
19 Plaintiff's self report. (Tr. 27.)

20 Ms. Alvarado is not an acceptable medical source and,
21 therefore, she is not qualified to diagnose an impairment. 20
22 C.F.R. § 416.913(a), (d)(4); SSR 06-03p. However, her opinions
23 regarding how Plaintiff's impairments affect her ability to work
24 must be considered and may be rejected only with specific, "germane"
25 reasons. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); *Nguyen*
26 *v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). To the extent the

1 ALJ was rejecting Ms. Alvarado's diagnoses,¹ the fact that she is not
2 an acceptable medical source is an adequate reason to disregard her
3 opinions as to diagnosis. However, this is not a germane reason to
4 reject her separate opinions regarding Plaintiff's ability to
5 perform work functions. 20 C.F.R. § 416.927(d)(5); SSR 06-03p
6 ("*Other Sources*").

7 Consistent with factors listed in SSR 06-03p,² the ALJ properly
8 considered the treatment relationship and whether Ms. Alvarado
9 presented relevant evidence to support her opinion. He acknowledged
10 Ms. Alvarado's treatment relationship, but rejected her conclusions
11 because they were based entirely on Plaintiff's statements. (Tr.
12 27.) This is a specific, germane reason to reject a medical "other
13 source" opinion. See, e.g., *Tonapetyan v. Halter*, 242 F.3d 1144,
14 1149 (9th Cir. 2001)(medical opinions based on subjective complaints
15 can be rejected where credibility has been properly discounted). As
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17 ¹ Ms. Alvarado diagnosed major depressive disorder and post-
18 traumatic stress disorder on March 26, 2009. (Tr. 277.) On August
19 6, 2009, based on objective testing, Dr. Lynn Orr diagnosed
20 depressive disorder recurrent moderate, with post traumatic stress
21 disorder features. (Tr. 296.) These acceptable medical source
22 diagnoses were properly adopted by the ALJ at step two. (Tr. 18.)

23 ² Those factors include the length and frequency of treatment
24 relationship; the other source opinion's consistency with other
25 evidence; relevant evidence presented by the other source to support
26 her opinion; the source's specialty; how well the opinion is
27 explained; and other factors "that tend to support or refute the
28 opinion." SSR 06-03p.

1 found by the ALJ, no testing or objective data was provided by Ms.
2 Alvarado to support her opinions. The only clinic record submitted
3 was an intake statement completed by Plaintiff. (Tr. 279-84.)
4 Plaintiff's unreliable self-report is not sufficient to support Ms.
5 Alvarado's conclusions. See *Valentine v. Astrue*, 574 F.3d 685, 694
6 (9th Cir. 2009)(claimant's lack of credibility germane to reject lay
7 testimony based on claimant's subjective complaints).

8 Even assuming reasons given by the ALJ were not germane,
9 Plaintiff fails to specify which of Ms. Alvarado's opinions were
10 erroneously ignored and in what way the error caused harm. Without
11 the requisite specificity and analysis supported by the record,
12 Plaintiff has not met her burden to show prejudicial error. *Shineski*
13 *v. Sanders*, 556 U.S. 396, 409-410 (2009)(party seeking to reverse has
14 the burden to explain harm in alleged error).

15 **C. Testifying Medical Expert Opinions**

16 Plaintiff next argues the ALJ erred by rejecting "moderate"
17 limitations due to pain and fatigue assessed by medical expert David
18 Rubin, Ph.D. (ECF No. 14 at 14.) The ALJ gave significant weight
19 to Dr. Rubin's testimony that Plaintiff is "capable in terms of
20 intelligence, memory, and getting along with others," but would have
21 moderate limitations due to pain and fatigue "related to her physical
22 problems." (Tr. 27, 47, 314.) The ALJ discounted Dr. Rubin's
23 "moderate limitation" on Plaintiff's ability to complete a normal
24 workday due to physical symptoms of pain and fatigue (Tr. 48-49,
25 314), because he is an expert in psychology and his opinions on the
26 effects of Plaintiff's physical limitations were not within his
27 expertise. (Tr. 27.) This reason is specific and supported by the
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1 Regulations and the medical record in its entirety.

2 The Regulations state that opinions of treating and examining
3 physicians are given more weight than the opinions of non-examining
4 medical sources. 20 C.F.R. § 416.927(c). If a medical source is a
5 specialist, more weight is given to opinions about medical issues
6 within his or her speciality. 20 C.F.R. § 416.927(d)(5). Thus,
7 according to the Regulations, the ALJ properly rejected Dr. Rubin's
8 opinions regarding Plaintiff's physical abilities. In addition, the
9 record shows Plaintiff's treating physician reported Plaintiff's
10 headaches were well-controlled with medication and did not opine
11 symptoms from her other impairments precluded work. As noted by Dr.
12 Rubin, the record shows Plaintiff was functioning "quite well,"
13 socially and cognitively. (Tr. 47.) She could care for her children
14 and attend their athletic events and perform normal daily chores.
15 (Tr. 23, 46.) The ALJ's specific rejection of Dr. Rubin's opinion
16 regarding the effect of physical limitations is supported by
17 substantial evidence.

18 In addition, the court can reasonably infer the ALJ did not
19 disregard the effects of pain and fatigue caused by her physical
20 condition, including obesity, by reading the ALJ's summary of the
21 evidence, his credibility determination, and his RFC findings.
22 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ
23 specifically modified Plaintiff's exertional level by limiting her
24 to two hours of standing and walking in an eight-hour day and simple
25 three-step work. He also included postural limitations to
26 accommodate her physical impairments and attendant symptoms of pain
27 and fatigue. (Tr. 24.)

1 **D. Step Five: Hypothetical Question**

2 Plaintiff's argument that the ALJ failed to include all her
3 limitations is without merit. (ECF No. 14 at 19-20.) The ALJ may
4 rely on vocational expert testimony if the hypothetical presented to
5 the expert includes all functional limitations supported by the
6 record and found credible by the ALJ. *Bayliss v. Barnhart*, 427 F.3d
7 1211, 1217 (9th Cir. 2005).

8 As discussed above, the ALJ thoroughly summarized and evaluated
9 evidence from acceptable medical sources and other sources, and
10 properly assessed Plaintiff's credibility. (Tr. 18-23, 25-26.) The
11 final determination regarding Plaintiff's ability to perform basic
12 work is the sole responsibility of the Commissioner, and no special
13 significance may be given to a medical source opinion. 20 C.F.R. §§
14 404.1527(e), .1546, 416.927(e), .946; SSR 96-5p. The hypothetical
15 relied upon by the VE reflects those limitations reasonably supported
16 by the record and credible testimony. (Tr. 64-65.) In addition,
17 limitations due to pain and fatigue were addressed reasonably by the
18 exertional and non-exertional restrictions propounded to the VE and
19 included in the ALJ's final RFC determination. (Tr. 24.) Because the
20 hypothetical presented at step five is a rational interpretation of
21 the entire record and reflects the final RFC determination, the ALJ
22 did not err in relying on VE testimony that there were jobs in
23 significant numbers that Plaintiff could perform. Accordingly,

24 **IT IS ORDERED:**

25 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
26 **DENIED;**

27 2. Defendant's Motion for Summary Judgment (**ECF No. 16**) is
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The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant, and the file shall be **CLOSED**.

DATED April 18, 2012.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE